
(2017) 06 BOM CK 0068
In the Bombay High Court
Case No : 106 of 2009

Shri. Shivram Anant Dessai (since deceased), & Ors.

APPELLANT

Vs

Shri. Arjun Ramchandra Pednekar (since deceased)
represented through his L.R.s, & Ors.

RESPONDENT

Date of Decision : 07-06-2017

Acts Referred:

Citation : (2017) 06 BOM CK 0068

Hon'ble Judges : C. V. Bhadang

Bench : SINGLE BENCH

Advocate : A. D. Bhobe, Mahesh Amonkar

Final Decision : Allowed

Judgement

1. The appellants are the legal representatives of the original plaintiffs Shri Shivram Desai while the respondents are the legal representatives of the original defendant Shri Arjun Pednekar. For the sake of convenience the parties are referred to as plaintiff and defendant.

2. The plaintiff filed Regular Civil Suit no. 24 of 2001 (old Civil Suit no. 91/1997) for the following reliefs:

(a) The defendant may be ordered to demolish the suit toilet block as shown in the sketch (Exh. A) annexed to plaint and the defendant may be ordered to demolish and remove the Poultry Structure shown in the sketch.

(b) The defendant or any person claiming through him may be restrained from doing any construction or reconstruction with respect to the suit mangor or in any open space in survey no. 504/1 at Pernem unless he has purchased the dwelling house area under the Act and same construction falls within such dwelling house area.

3. The case made out in the plaint is that the defendant is a mundkar of a dwelling house and had constructed a toilet block near mangor and a poultry

farm a year before filing of the suit and this was without the consent of the plaintiff.

4. The defendant resisted the suit on various grounds. It was contended that the poultry structure and the mangor and the toilet block are structures constructed, more than 15 years prior to the filing of the suit. The septic tank was only extended sometime prior to the filing of the suit.

5. The learned Trial Court framed the following issues:

ISSUES

1. Whether the plaintiff proves that the defendant has constructed a new toilet block admeasuring 5.55meters x 3.40 meter adjoining to the suit mangor int he survey No.504/1 without consent and permission of the plaintiff?

2. Whether the plaintiff proves that the Pernem Municipal Council was in existence on the appointed day for the purpose of Goa Mundkars (Protection from Eviction) Act, 1975 that is 12th March, 1976?

3. Whether the plaintiff proves that he is entitled to restrain the defendant or any person claiming through him from doing any construction or reconstructed with respect to the suit mangor or in any open space in survey No. 540/1 at Pernem.

ADDITIONAL ISSUES

1. Whether the plaintiff proves that he is entitled to the reliefs as prayed for in the plaint?

2. Whether the defendant proves that he has acquired prescriptive right over thepoultry structure?

3. Whether the defendant proves that his Court has no jurisdiction to decide whether the poultry structure falls inside or outside the dwelling house area?

6. The learned Trial Court answered the issue no. 1 in the negative holding that the plaintiff has failed to prove that the toilet block was constructed without his consent or permission. In so far as issue no. 2 and 3 are concerned, the learned Trial Court relied upon the admission of the plaintiff in the cross examination in which the plaintiff has stated that the poultry structure was constructed by the defendant in the year 1972 with his permission. In so far as issue no. 3 is concerned, the learned Trial Court found that it is redundant. This was for the reason that the plaintiff has shown the cause of action of filing the suit when the defendant was declared as a mundkar. The learned Trial Court found that the declaration of the defendant as mundkar cannot accrue cause of action for filing the suit "because the defendant was already a "mundkar". The learned Trial Court found that the issue no. 3 is redundant because "even if the poultry structure falls outside the dwelling house of the area even then there is no cause of action to the plaintiff to get it demolished. In the face of the findings as above, the learned Trial Court dismissed the suit.

7. The plaintiff challenged the same before the learned District Judge in Regular Civil Appeal No. 80 of 2002. The learned District Judge framed the following points for determination:

Point for determination:

1 Did the Ld. C.J.J.D., Pernem, err in holding that the suit toilet block was constructed with the permission of the plaintiff?

2. Did the Ld. C.J.J.D., Pernem, err in refusing to direct the plaintiff to remove the poultry structure?

3. Did the Ld. C.J.J.D., Pernem, err in not restraining the defendant from doing construction or re-construction of the suit mangor or doing any construction in the open space in the suit property?

8. The learned District Judge answered the point no. 1 and 2 in the negative while point no. 3 in the affirmative and by judgment and decree dated 14.12.2006 disposed of the appeal in the following terms:

"The impugned judgment and decree be set aside. The respondents are restrained from constructing or reconstructing the mangor. The respondents are restrained from doing any construction in the vacant land in the suit property. The respondents shall pay the costs to the appellants."

9. Feeling dissatisfied with the refusal to grant mandatory injunction for demolishing the toilet block, poultry structure and the mangor, the appellant has filed this second appeal.

10. This second appeal was admitted on 22.08.2011 on the following substantial question of law:

"Whether the lower appellate Court erred in holding that the suit toilet block was constructed by the original defendant with the permission of the plaintiffs and that the plaintiffs acquiesced in the construction thereby depriving the plaintiffs the relief of mandatory injunction sought for by them".

11. I have heard Shri A. D. Bhobe, the learned Counsel for the appellant and Shri Mahesh Amonkar, learned Counsel for the Respondent. With the assistance of the learned Counsel for the parties, I have gone through the records and the impugned judgments, passed by the courts below.

12. It is submitted by Shri Bhobe, the learned Counsel for the Appellant that the findings recorded by the Courts below on the aspect of the date when the toilet block was constructed and holding that the plaintiff had consented/acquiesced in the construction of the toilet block is perverse and against the weight of the evidence on record. The learned Counsel has extensively taken me through the reasoning articulated by the courts below in order to demonstrate that such finding could have been reached on the basis of evidence available. It is submitted that the finding of fact which is perverse partakes of the nature of a

substantial question of law.

13. On the contrary, Mr. Mahesh Amonkar, the learned Counsel for the respondent has strenuously urged that in so far as poultry structure and mangor is concerned, the plaintiff has admitted that the structures were constructed with the permission of the plaintiff and, as such, no exception to the findings can be taken to the said findings. Even so far as the structure of the toilet block is concerned, it is submitted that it was constructed more than 15 years prior to the filing of the suit and the only alteration made was an extension of septic tank and that too, with the permission of the plaintiff. In this regard, the learned Trial Court has relied on the evidence of PW-2 who was the mason engaged by the defendant for extension of the septic tank.

14. I have carefully considered the rival circumstances and the submissions made. As noticed above, the second appeal has been admitted only on the question of toilet block been constructed with the permission and/or acquiescence of the plaintiff. Even otherwise there is clear admission so far as poultry structure is concerned that it was constructed by the defendant in the year 1972 with the permission of the plaintiff. Indisputably, during the pendency of the suit the defendant has been declared as a Mundkar and as such no exception can be taken to the finding in respect of the mangor. Thus, we are only concerned with the finding in so far as the toilet block is concerned.

15. The reasoning of the Trial Court with regard to issue no. 1 can be found in para 5 of the impugned judgment. The Trial Court had held that because the plaintiff did not file any police complaint nor had raised any grievance with the Municipal authorities or other authorities for a period of one year, indicates that the plaintiff had consented/acquiesced for the construction of the toilet block. It would be significant to note that the learned Trial Court in para 5 of the judgment has clearly come to the conclusion that, it is not proved as to in which year the defendant constructed the toilet block. There are two more reasons articulated by the learned Trial Court for holding that the plaintiff had consented for construction of the toilet-cum-bathroom which may be re-produced as under:

"From the evidence it seems that the plaintiff consented for the construction of the toilet block because firstly because the house of the plaintiff is very near to the house of the defendant and further he admits in his cross that, "in his house besides he, his wife and two sons, their wife and children are residing".

16. The first appellate court has found that PW-2 is not a reliable witness. Thus, the first appellate court has not relied upon the evidence of PW-2. In para 21, the first appellate court has observed thus:

"21. The oral evidence adduced by the plaintiff shows that the suit toilet block was recently built without the plaintiff's permission. The oral evidence of the defendant shows that it is an old structure built with the plaintiff's permission. There is no expert evidence to show the age of the structure."

17. It is thus apparent that no finding as such is recorded in para 21 as referred above. The first appellate court has merely referred to the case and the evidence of the parties. Ultimately, in para 25 the first appellate court has observed thus:

"25. Doing permanent construction on land is an act of hostility. People do not wait for one year without giving complaints or filing suits. Therefore, the conclusion of the Ld. C.J.J.D., Pernem, that the plaintiff has consented to the same is a reasonable one. Therefore, the Ld. C.J.J.D. Pernem, had not erred in holding that the suit toilet block was constructed with the consent of the plaintiffs. Hence, I hold point of determination no. 1, in the negative."

It can thus be seen that the appellant Court has not adverted to the evidence led and then examined the findings of the learned trial Court so as to reach its conclusion.

18. At this stage, reference can be made to the decision of the Hon"ble Supreme Court in the case of Santosh Hazari v/s. Purushottam Tiwari reported in (2001) 3 Supreme Court Cases 179 which, inter alia, hold that the judgment of the appellate court must reflect its conscious application of mind and record findings supported by reasons, on all the issues arising alongwith the contentions put forth and pressed by the parties. The first appellate court is the final court of facts and thus the judgment should indicate that the evidence led has been considered and the court has come to its own conclusion and findings. (See para 15 of the Judgment in the case of Santosh Hazari).

19. I have given my anxious consideration to the rival contentions and on consideration of the same, I find that the appeal needs to be remanded back to the learned District Judge for deciding it afresh in accordance with law.

20. I am conscious of the fact that the first appeal which pertains to the year 2002 is being sent back. However, in the circumstances, there is no other option available. It is made clear that this remand is only limited to the extent of examining the claim of the plaintiff in so far as the toilet block is concerned.

21. In the result, the following Order is passed:

O R D E R

(i) The appeal is partly allowed.

(ii) The impugned judgment and order dated 14.12.2006 passed by the learned Ad-hoc District Judge at Mapusa is set aside to the extent of refusal of the mandatory injunction irrespective of the toilet block.

(iii) The Regular Civil Appeal No. 80/2002 is hereby restored to the file of the learned District Judge for deciding the claim of the appellant seeking mandatory injunction seeking demolition of the toilet block.

(iv) The rest of the impugned judgment and decree granting prohibitory injunction stands.

(v) Parties to remain present before the learned District Judge on 27.06.2017 at 10:00a.m.

(vi) In the circumstances, parties are left to bear their own costs.