

(2010) 06 BOM CK 0027

In the Bombay High Court

Case No : Second Appeal No. 72 of 2009

Shri Vasant Yeshwant Hegde, (since deceased) By his Legal Representatives Harshad V. Hegde, Dilip V. Hegde, Smt. Deepali D. Hegde, Samir V. Hegde, Smt. Neha N. Dangi, Ninad V. Dangi and Smt. Sarita V. Hegde

APPELLANT

Vs

Shri Pundalik Gurudas Sinai Caro and his wife and Others

RESPONDENT

Date of Decision : 15-06-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2010) 06 BOM CK 0027

Hon'ble Judges : U.D. Salvi, J

Bench : Single Bench

Advocate : S.D. Lotlikar, with Mr. H. Kankonkar, for the Appellant; P. Rao, for the Respondent

Final Decision : Dismissed

Judgement

U.D. Salvi, J.—This appeal arises out of the judgment and decree dated 15.07.2009 passed by the Ad hoc Additional District Judge-II, FTC-II, Margao in Regular Civil Appeal No. 148/2008 preferred against the judgment and decree dated 06.11.2008 passed in Regular Civil Suit No. 595/2000 (initially numbered as Special Civil Suit No. 323/1994-III(o)) by the IIIrd Additional CJSD, Margao. The appellants were the plaintiffs in Regular Civil Suit no.595/2000 instituted against the respondents for partition and declaration: that they are the lawful owners of the peaceful possession and enjoyment of the suit property admeasuring 1737.5 square meters corresponding to 1/10th share of the landed property known as "SOCLEM NISSIANTUM" or "SOKLEA VICIANTAN" or "AMBOT SHET" situate at Davorlim, Tal. Salcete, District South Goa; and for demarcation of 1/10th share of the said landed property and consequential relief of permanent injunction restraining the defendants from interfering in the suit property in any manner whatsoever. According to the plaintiffs, they had acquired right to the said distinct part of the landed property by virtue of notarial

deed of sale dated 17.08.1962, which was subsequently rectified for the purposes of identifying 1/10th share of the entire property sold to the plaintiffs vide deed of rectification dated 31.07.1964. It is the plaintiffs' case that a major portion of the suit property admeasuring 1225 square meters is surveyed in the record of rights under survey No. 68/7 standing in the name of the plaintiffs and the remaining part of the suit property admeasuring 512.5 square meters has been wrongly amalgamated in the other plot i.e. Lote No. 2 situate to the east of the suit plot surveyed under Survey No. 68/8; and at the time of revenue Cadastral survey the said entire landed property has been surveyed under Survey No. 66/2, 68/7 and 68/8 of village Davorlim totally admeasuring 17375.00 square meters; and 1/10th share in the entire property acquired by the plaintiffs has been identified with wrong boundary measurement. The respondents/ defendants disputed the plaintiffs' case with the written statement dated 26.10.1999.

2. A declaration that the plaintiffs are the lawful owners in peaceful possession and enjoyment of the suit property i.e. 1/10th share consisting of area 1737.5 square meters surveyed under Survey No. 68/7 and 68/8 part consisting of an area admeasuring 1225 square meters and 512.50 square meters respectively, was granted at the end of the trial in the said suit. Directions were issued to the Surveyor from Land Survey Department to demarcate the said property as shown in the plan at Exh.63/C prepared by the Engineer Pascoal Noronha - the witness of the plaintiffs. This judgment and decree was challenged in Regular Civil Appeal No. 148/2008 by the respondents /defendants before the District Judge, South Goa. The First Appellate Court passed the following order :

The impugned judgment and decree is set aside. The Surveyor from the Land Survey Department is directed to demarcate the eastern boundary of the suit property such that it would measure the length of 48 meters. While doing so, the size of the suit property should not be reduced. It should only be increased. The defendants are restrained from interfering in the suit property or cutting trees in it, as demarcated by the Surveyor from the Land Survey Department. Parties shall bear their own costs.

3. Ld. Advocate Lotlikar for the appellants-the original plaintiffs submits that the following substantial questions of law arise in the present appeal :

(A) Whether, the principle that if there is discrepancy between area of the plot and the dimensions thereof, the dimensions will prevail, was attracted to the case before the Court ?

(B) Whether the Court was right in allowing the appeal of the respondents, sheerly on the principle that dimensions prevail over the area in the event of discrepancy, ignoring the remaining evidence on record, and particularly report of the expert/ engineer examined on behalf of the appellants ?

(C) Whether in the facts and circumstances of the case, and in view of the fact that if the dimensions were to be adhered to, the area of the plot purchased by

the appellants would be less than 1/10th of the total area and would cease to be an irregular triangle but would become quadrilateral, there were justifiable reasons for ignoring the dimensions in order to ascertain the true extent of the plot purchased by the appellants ?

(D) Whether, the conclusion reached by the Trial Court that the plot admeasuring 1737.50 square meters is equivalent to 1/10th of the entire property, was legally sustainable; and that reaching of the conclusion by the First Appellate Court, in reversal thereof, is legally sustainable ?

4. He further submitted that the aforesaid substantial questions of law arise in view of the First Appellate Court's reliance on the dimensions mentioned in the sale deed to deny to the appellants the area equivalent to 1/10th of the entire plot which was purchased by them; and on the principle that if there is discrepancy in the area and the dimensions, the dimensions should prevail.

5. Referring to the testimony of PW3 - Pascoal Noronha, Engineer, Ld. Advocate Lotlikar submitted that PW3 Noronha upon visit to the site had discovered that if the eastern dimension of the plot is to be maintained at 48 meters as per the document, shape of the plot would not remain an irregular triangle and the plot would become four sided; and, therefore, PW3 -Noronha had suggested the instant dimension of the plot not to be 48 meters, but to be 60 meters in order to bring the area of the property in tune with the description as 1/10th of the entire property with the shape of irregular triangle totally admeasuring 1737.50 square meters. According to the Ld. Advocate Lotlikar for the appellants, plan of PW3-Noronha was in tune with the existence of old plinth of cowshed and cow dung pit which indicate the holding of possession of the area claimed to be part of the property purchased by the plaintiffs' predecessor in title.

6. Ld. Advocate Parag Rao for the respondents referring to the sale deed and deed of rectification submitted that the boundaries of the properties sold to the plaintiffs were clearly spelt out with a statement that the remainder of the property was 9/10th; and in such situation, the First Appellate Court had correctly arrived at the conclusion/ finding in relation to the factual matrix of the plaintiffs' case and proceeded on the basis of the well settled principle of law that when there is conflict between area and boundary, the boundary shall prevail. According to him, no substantial questions of law, which requires to be answered, arises in the present appeal. Commenting on the scope of the High Court's power to interfere in the second appeal, the Ld. Advocate Rao for the respondents submitted that it is not within the domain of the High Court to investigate the grounds on which the findings were arrived at by the First Appellate Court; and in a case wherefrom the given set of circumstances, two inferences are possible, one drawn by the Lower Appellate Court is binding on High Court in Second Appeal, and the approach other than this is not permissible. In support of his submissions, he cited judgments reported in Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar and Others, and Narayanan Rajendran and Another Vs. Lekshmy Sarojini and Others, Ld. Advocate Rao for

the respondents further submitted that the substantial questions of law must be debatable one, which has not been settled earlier by Statute or binding precedent or must have material bearing on the decision of the case. In support of his submissions, he further placed reliance on the judgment reported in (2001) 3 179-Santosh Hazari Vs. Purushottam Tiwari (deceased) by LR. and unreported judgment in S.A. No. 92/2003-Vishnu Govind Naik Vs. Harishchandra Dattaram Thakur and Anr on 5th May, 2006 by this Court.

7. Perusal of the First Appellate Court's judgment reveals that for answering the material issue on fact that "Did the Ld. CJSD, Margao erred in holding that the area of the property purchased by the plaintiff is 1737.5 square meters?", the Ld. First Appellate Court did take into consideration the testimonies of the plaintiffs' witnesses, particularly PW3-Pascoal Noronha-the Civil Engineer along with the deed of sale dated 17.08.1962 Exh.PW1/C and deed of rectification dated 31.07.1964 Exh.PW1/D. The Ld. First Appellate Court did observe that the suit property should have admeasured 1737.50 square meters being 1/10th of the whole of the property, but it is shown that the property of the plaintiff has been surveyed under Survey No. 68/7 admeasuring only 1225 square meters. Rightly, the Ld. First Appellate Court from the reading of the sale deed Exh. PW1/c and deed of rectification PW1/d further observed that the property sold is bounded on the "north by the properties of Eusebio Rodrigues, Joao Caetano Cruz and brothers and on the south by no path and it has the shape of irregular triangle of which internal side measuring is 50 meters and 40 cms and 48 meters respectively on the south and the east." As regards the survey plan of Survey No. 68/7 at Exh. PW1/A, the Ld. Appellate Court found that eastern boundary admeasured only 45 meters and other boundaries remaining as per the sale deed and rectification deed. Concluding observations of the Ld. First Appellate Court are found at para No. 18 of the impugned judgment as under :

..... oral evidence cannot over rider the written document. Within the boundaries as mentioned in the sale deed and rectification deed, there cannot be an area of 1737.50 square meters. The plan drawn by Engineer PW3 shows the eastern boundary to be larger (60 meters and not 48 meters as described by sale deed and rectification deed) than what is shown in the sale deed. When there is conflict between the area and boundary, the boundary shall prevail. Therefore, the Ld. CJSD, Margao had erred in holding that the plaintiffs' property admeasures 1737.50 square meters. Hence, I hold point for determination No. 1 in the affirmative.

8. The principle of law that when there is conflict between the area and boundary, the boundary shall prevail, is not disputed by the appellants. Parties concede that nothing has remained debatable in the said proposition of law being settled earlier by binding precedent. One can clearly see that this principle of law has clinched the issue and turned tables against the plaintiffs. Going by the observations of the Hon'ble Apex Court at para 6 of Kondiba Dagadu Kadam's case even wrong application of settled principle of law on the facts of the case

would not be termed to be a substantial question of law.

9. Ld. Advocate Lotlikar for the appellants as a last minute effort to save the present appeal, submitted that the substantial questions of law framed and mentioned at para. 8 of the appeal memo, may not be happily worded, but can be appropriately worded by this Court to raise substantial question of law questioning the application of the said legal principle in a case of the present kind wherein the dimension of the third arm of the triangular property acquired by the plaintiffs has not been mentioned in the sale deed. No doubt that there is indispensable obligation to do justice at all stages, but it needs to be done within the parameters prescribed by Section 100 of Code of C.P.,1908. Perusal of the sale deed and the deed of rectification shows that what was sold to the plaintiffs was piece and parcel of land i.e. Lote No. 1 of Gleb A whose dimensions touching 9/10th larger portions of the property from which it was carved out, were clearly stipulated in terms of meters. What lay on the other side of the remaining arm of the irregular triangle shaped property -Lote No. 1, was also clearly described in the said sale deed. It is therefore, a folly to presuppose, as conceived by the Ld. Advocate Lotlikar for the appellants, that the boundary being the third arm of the irregular shaped property sold to the plaintiffs. Lote No. 1 remained undescribed. No substantial question of law is, therefore, seen to arise in the present appeal. The appeal is, therefore, dismissed in limine.