

(2012) 05 BOM CK 0039

In the Bombay High Court

Case No : Second Appeal No. 48 of 2003

Smt. Felicidade Braganza, widow, since deceased through her legal heirs, Martinho Braganza, Goa and Mrs. Mary Braganza

APPELLANT

Vs

Mrs. Francisca Marques Pereira e Silveira

RESPONDENT

Date of Decision : 17-05-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, 100

Citation : (2012) 05 BOM CK 0039

Hon'ble Judges : U.V. Bakre, J

Bench : Single Bench

Advocate : P. Talaulikar, for the Appellant; M. B. Da Costa with Mr. J. A. Lobo, for the Respondent

Final Decision : Dismissed

Judgement

U.V. Bakre, J

1. This Second Appeal takes exception to the Judgment and Decree of the Additional District Judge, Mapusa (First Appellate Court) in Regular Civil Appeal No. 90 of 2000. Regular Civil Appeal no. 90 of 2000 was preferred by the present appellants, challenging the Judgment and Decree dated 30/03/2000 of the Civil Judge, Junior Division, Mapusa (Trial Court) in Regular Civil Suit No. 98/88/B.

2. That Civil Suit had been instituted by the respondent of the present Second Appeal, who is the original plaintiff.

3. The parties shall be referred to as per their status in the said Regular Civil Suit No. 98/88/B.

4. The plaintiff is the owner of the property known as "Poriato" bearing survey no. 198/2 situated at Mudda Vaddi of village saligao of Bardez Taluka. The defendants are having a dwelling house and store room (suit room) in the said property. As on the date of filing of the suit, the original defendant was

registered as Mundkar in respect of the dwelling house. The plaintiff filed the said suit for following prayers :

- a) For a permanent injunction restraining the defendants, their agents, servants and representatives from interfering with the plaintiff's possession of the suit property and/or doing any construction in the suit property and also restraining them from carrying on any work to the suit room.
- b) For a mandatory injunction directing the defendants to demolish the suit room along with all the illegal extensions and restore the land to its original condition and to demolish the extensions and pavement around the suit room to the extent of 123.79 square metres and area covered with plants after suit was filed and restore the land to its original condition and hand over possession of the land beneath to the plaintiff.
- c) For a Mandatory injunction directing the defendants to demolish the illegal extensions done to the dwelling house under No. 148 towards southern side totally admeasuring 34.24 square metres plus 36.90 square metres and also the extensions done on the north side of dwelling house as pleaded in para 13(a) to 13(d) and shown in the croquis / plan annexed.

5. The suit was wholly decreed by the Trial Court.

6. During the pendency of the said suit, the defendants purchased the mundkarial area of 478.5 square metres. The Joint Mamlatdar of Bardez (II), Mapusa had carried out demarcation of the dwelling house and the plan was accordingly drawn. However, the said purchase order and the plan were not produced before the Trial Court.

7. In the Regular Civil Appeal No. 90 of 2000, the defendants filed an application under Order 41 Rule 27 of the CPC for leave to produce the purchase order dated August 1994 in case no. MND/PUR/51/92 annexed to which is the revised plan showing the dwelling house and the surrounding area purchased by the defendants. By order dated 20/06/2001, the First Appellate Court allowed the said application.

8. Considering the entire evidence on record and the additional documents produced by the defendants, the First Appellate Court partly allowed the appeal and modified the order and decree passed by the Trial court. The First appellate court has passed the following:

O R D E R

Appeal is partly allowed whereby the impugned judgment and decree ordering the demolition of the suit room with the extensions and pavements and also to the house no. 148 beyond the plinth apart from the decree of permanent injunction would stand modified whereby the plaintiff would be entitled to the relief of permanent injunction to restrain the defendants as earlier ordered by the trial Court and also for demolition of the suit room with the extensions and the

pavement. However the extension to the dwelling house 148 shall not be demolished. In view of the modifications of the impugned judgment, the defendants shall also hand over possession of the land where the suit room with three extensions stands to the plaintiff. Parties to bear the cost of the appeal.

9. Aggrieved by the said judgment and decree of the First Appellate Court, the present Second Appeal has been preferred and the same has been admitted on the following substantial questions of law namely:

a) The prayer for demolition was sought on the ground that no permission of the respondent was obtained for the same and because of extension. In the background of these pleadings could relief have been granted on the ground that appellants have no right for the store room?

b) Whether the courts below could have passed order of demolition in respect of extensions, which even admitted as such, fall within the area purchased as Mundkarial area by the appellants?

10. Shri. P. Talaulikar, learned advocate on behalf of the defendants, argued that there is no evidence on record to establish that the location of the store room has been shifted while reconstructing the same and mere finding that there is extension by way of pavement would not prove shifting. He further submitted that the evidence on record clearly reveals that part of the suit room falls within the mundkarial area purchased by the defendants and therefore the first Appellate Court could not have ordered demolition of the entire suit room with extensions and pavements. According to learned counsel for the defendants, the Plaintiff's evidence, itself, more particularly of P.W. 3, Rohidas Shirodkar and P.W. 4, Prazeres Gonsalves read with his survey report and the sketch plan which are in Exhibits P.W.1/H and P.W.1/I, if compared with the plan of the mundkarial area drawn by the Mamlatdar, duly prove that part of the suit room lies within the purchased mundkarial area. He, therefore, submitted that the Second Appeal be partly allowed to the extent of the suit room which lies within the land purchased by the defendants, in their capacity as mundkars.

11. Per contra, learned senior advocate Shri M. B. Da Costa, on behalf of the plaintiff, invited my attention to paragraph 12(d) of the plaint, wherein it has been specifically pleaded that the suit room is totally situated outside the said area demarcated by the Joint Mamlatdar in the said Purchase Case No. 51/92 and that this fact has been admitted by the defendants in their written statement filed in another Civil Suit No. 207/97/D. He then took me through the additional written statement filed by defendants wherein they have not denied that the suit room was beyond the demarcated mundkarial area of the dwelling house, pursuant to the order of Mamlatdar. Learned Senior Counsel further pointed out that in paragraph 10 of the impugned judgment, the First Appellate Court has held that that judgment and the decree of the trial court would stand modified thereby saving the house structure with extensions which are within the demarcated area, from the order of demolition. Thus, the learned senior counsel

contended that by the decree of the First Appellate Court, that which is within the Mundkarial area purchased by the defendants has been saved and in such circumstances, the substantial questions which have been framed do not arise and even if they arise, they are liable to be answered against the defendants. The learned senior counsel has relied upon Antonio Salvador Francisco Joaquim Celemente Mesquita and another Vs. Pedro Carvalho and another, . Learned senior counsel, therefore, urged that there is no substance in this Second Appeal and prayed that the same be dismissed with cost.

12. In the case of "Antonio Mesquita"(supra), dispute was about a structure raised by alleged "Mundkar" at a distance of about 50 metres from the house occupied by him. It has been held that where the structure is situated within 300 square metres or 5 metres around the house in Panchayat area and 200 square metres or 2 metres around the house in Municipal area, claimed to be the part of the dwelling house and such claim is disputed by Bhatkar, the issue is to be decided by the Mamlatdar. It has been further held that when the structure is beyond 5 metres or 300 square metres, which cannot form part of the dwelling house, Civil Court has jurisdiction. From the above, it is clear that the defendants, who were admittedly the Mundkars of the plaintiff have no right, to maintain the said room which is beyond the mundkarial area, by claiming the mundkarial right.

13. The plaintiff by way of amendment added various paragraphs to the plaint. In para 12(d), added by way of amendment to the plaint, the plaintiff alleged that the suit room is totally situated outside the area demarcated by the Joint Mamlatdar in the purchase case no. 51/92 and that this fact is admitted by the defendant in their written statement filed in another Civil Suit no. 207/97/D in the court of Senior Civil Judge, First additional, Mapusa filed by the plaintiff against the same defendants with regard to the suit room, after the purchase was decided. In the additional written statement filed by the defendants, the above facts have not been denied. The First Appellate Court, in paragraph 4 of the impugned Judgment has observed that the defendants did not deny that suit room was beyond the demarcated area of 5 metres around the outer walls of the dwelling house, pursuant to the order of the Mamlatdar. Therefore, first of all, admittedly, the suit room with extensions lies out side the mundkarial area purchased by the defendants. The contention of Mr. Talaulikar, learned Counsel for the defendants that the evidence on record reveals that part of the suit room falls within the mundkarial area purchased by the defendants, has no substance at all.

14. The case of the plaintiff was that the defendants had one store room admeasuring 7 metres x 4 metres but in or about March 1987, the defendants demolished the said store room and reconstructed the same at a distance of about 5 to 6 metres away from their house and that the same is an extended structure. The plaintiff also alleged that the said structure totally falls outside the demarcated mundkarial area. According to the plaintiff, all the above was done

without permission and consent of the plaintiff. The defendants, however, stated that they were already having their store room in the said property in addition to their house and that with due permission from the plaintiff and licence from the Village Panchayat, they demolished the said structure on or about 25/2/1987 and reconstructed the same within the same plinth area, which work was completed before the end of April, 1987. They denied of having done any extensions. The above pleadings are all on facts. The Trial Court, upon consideration of the evidence on record, has held as follows: that the plaintiff has proved that the suit room has been extended by 1.25 metres on all four sides to convert it into a veranda; that the defendants could not prove that they have completed the reconstruction within the plinth area; that the plaintiff has proved that the defendants have further extended the suit room and have now occupied a total area of 123.79 square metres; that the defendants have not proved that the reconstruction was done with the permission of the plaintiff; that the reconstruction of the suit shed is without licence; and that the original store room was 5 metres away from the dwelling house. The First Appellate Court has independently assessed the entire evidence on record and has concurred with the findings of the Trial Court, insofar as the suit room is concerned. The findings of the First Appellate Court further reveal that she has taken into account the evidence of the plaintiff (P.W.1) to the effect that no permission was taken by the defendants before demolishing the hut and putting up a new construction, in its place. The First Appellate Court has observed that not even a suggestion has been put to P.W.1 that she had orally allowed the defendants to go ahead with the construction and that acting on that assurance, they had carried out the reconstruction. I do not find any perversity in the above findings which are on facts, proved by evidence on record. There is no reason to disturb the above findings being of facts.

15. Concurrent finding of the Courts below, therefore, is that reconstruction and extension of the suit room is done without permission of the plaintiff and the same is also outside the mundkarial area. Therefore, the defendants have no right to maintain the same.

16. In the case of *Bharatha Matha and Another Vs. R. Vijaya Renganathan and Others*, , the Hon''ble Supreme Court has reiterated that it is not permissible for the High Court to decide the second appeal by re-appreciating the evidence as if it was deciding the first appeal, unless it comes to the conclusion that the findings recorded by the Court below were perverse. It has been held that the High Court must render a clear finding of perversity in order to show compliance of section 100 of the Code of Civil Procedure. This Court in the case of "*Narayan Mugu Teli (since deceased) Vs. Ramchandra Mugu Teli and Ors.*" [2004(3) ALL M.R. 880] has held that concurrent finding of fact given by Courts below, cannot be disturbed in second appeal.

17. In the case of *State Bank of India and Others Vs. S.N. Goyal*, , the Hon''ble Supreme Court has held that the Second Appeal is maintainable only if there is a

substantial question of law. "Substantial questions of law" means not only substantial questions of law of general importance, but also substantial question of law arising in a case as between the parties. A question of law which arises incidentally or collaterally, having no bearing on final outcome, will not be a substantial question of law as between the parties. It is not permissible for the High court to decide the Second Appeal by re-appreciating the evidence and interfering with findings of fact, ignoring question of law.

18. In the light of the above, when there is a clear finding of fact based on proper appreciation of the evidence on record to the effect that the suit room with extensions has been constructed without permission of the plaintiff and falls outside the mundkarial demarcated area, purchased by the defendants, this Court would not substitute its own conclusion, even if another view is possible.

19. In view of the above, the substantial questions, as framed, do not arise and even if they arise, they get answered against the defendants and in favour of the plaintiff. There is therefore no substance in this Second Appeal which fails and is dismissed without any order as to costs.